SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1403

EDWARD BRUSKE,

Petitioner,

vs.

JUDITH A. ARNOLD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable ~~William~~ Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Edward Bruske, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Illinois rendered in these proceedings on November 26, 1969.

OPINIONS BELOW.

The opinion of the Appellate Court, Third District, of the State of Illinois, reported at 100 Ill. App. 2d 428; 241 N. E. 2d 191 (October 23, 1968), appears at Appendix A, *infra*, pp. A1 to A6. The opinion of the Supreme Court of the State of Illinois, reported at 44 Ill. 2d 132, 254 N. E. 2d 453

(November 26, 1969), appears at Appendix B, *infra* pp. A7 to A12. The Supreme Court of the State of Illinois denied a Petition For Rehearing on January 26, 1970, without opinion, Appendix C, p. A13, *infra*.

JURISDICTION

The judgment of the Supreme Court of the State of Illinois was entered on November 26, 1969. See Appendix B, p. A6, *infra*. A Petition for Rehearing was duly filed and the Supreme Court of the State of Illinois denied the same on January 26, 1970, without opinion. See Appendix C, p. A13, *infra*. This petition for certiorari was filed less than 90 days from the date of the order denying the Petition for Rehearing aforesaid. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of Illinois, in interpreting and applying its own rules (which have the force of statutory law in Illinois) in such manner as to bar the plaintiff in a civil case from cross-examining and impeaching the defendant, as appears more fully below, violated the Fourteenth Amendment to the United States Constitution

   (a) by being inconsistent with due process of law;

   (b) by denying the plaintiff equal protection of the laws;

   (c) by, in effect, depriving the plaintiff of trial by jury, as guaranteed by Article II, Section 5 of the Constitution of the State of Illinois;

   (d) by enforcing a rule of court, having the force and effect of statutory law, in such manner as to abridge the privileges and immunities of a citizen of the United States.

2. Whether the Supreme Court of the State of Illinois by approving direct appeals to the bias and prejudice of the jury in the most flagrant and direct manner and in ignoring all prior contrary precedent of courts of review of the State of Illinois, has denied to your petitioner the protection granted by the Fourteenth Amendment to the Constitution of the United States

(a) by denying your petitioner due process of the law;

(b) by denying petitioner equal protection of the laws;

(c) by, in effect, depriving petitioner of trial by jury, as guaranteed by Article II, Section 5 of the Illinois Constitution;

(d) by abridging the privileges and immunities of a citizen of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment:

"No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws."

Constitution of the State of Illinois,

Article II, Section 2:

"No person shall be deprived of life, liberty or property, without due process of law."

Article II, Section 5:

"The right of trial by jury as heretofore enjoyed, shall remain inviolate . . ."

STATEMENT OF FACTS.

(Pertinent excerpts from the record, which your petitioner believes necessary or helpful in considering this petition are included in Appendix D, pp. A14 to A32, *infra.*)

Petitioner, Edward Bruske, while a pedestrian, was run down by an automobile operated by the respondent, Judith A. Arnold.

The petitioner filed suit against the respondent. Approximately six months before the trial, the respondent voluntarily made statements concerning material issues in the case, which were directly contrary to her testimony at the trial. Appendix D, pp. A14 to A22.) These issues went to the heart of the case and the position taken by the respondent at the trial vehemently *denied facts admitted* in her prior statement.

The trial court granted respondent's motion *to suppress* the prior statement *for all purposes including impeachment.* Accordingly, respondent took the stand and testified in her own behalf, *directly contrary* to her prior statement. Petitioner was *not allowed to cross-examine,* concerning the prior statement. The jury was kept in complete ignorance of its existence.

Throughout respondent's closing argument, respondent's attorney repeatedly appealed to the bias and prejudice of the jury.

> ". . . put yourself in this position here . . ." "Now, put yourself in the position of Judith here who almost had a mental block . . ."
>
> "*Let me ask you, how would you like to be a litigant in a law suit and have John Doe say to you whether or not you were on trial for your life or involved in a personal injury to have the other opposing counsel go to that person and say to them, 'Don't talk to them. Don't tell them anything. Don't go to them at all—'* "
>
> "Mr. Ozmon: Your Honor, I object to this, improper Argument."

Throughout his closing argument, the defendant's attorney constantly asked the jurors to put themselves in the place of the defendant. Examples are the following, among others:

He asked the jury to put themselves in the defendant's place as she was driving down the street.

He asked the jury if there was anything the defendant did or didn't do or should have done, that the jurors could have done to avoid the accident.

Defendant's Counsel, in his closing argument, proceeded to tell the jury that the plaintiff's attorneys wanted to pervert the testimony of witnesses but that the witnesses did not want to pervert their testimony; that plaintiff's attorneys had asked witnesses not to talk to defendant's attorneys. That he (defendant's attorney) thought it was particularly significant that the plaintiff gave or tried to give the jury as distorted view of the picture of the accident. That the plaintiff's case was characterized by falsehood and perversion of testimony. That plaintiff tried to have witnesses testify falsely. That the plaintiff was attempting to hide evidence.

Defendant's attorney proceeded to tell the jury what his long experience had taught him what proper conduct was in the trial of cases and why his experience told him the defendant was telling the truth.

In his closing argument, the attorney for the defendant repeatedly and directly contradicted the actual evidence and testimony of disinterested witnesses as well as the plaintiff, concerning material issues in the case. This conduct was repeated time and again throughout the closing argument. Counsel's contradiction of the evidence was directed at vital issues and were calculated to mislead the jury into believing that the evidence was other than that actually given. (See Appendix D, pp. A22-A32.)

(Examples of respondent's attorney's flagrantly prejudicial conduct and excerpts from the record indicating that such conduct was wholly without basis, merit or excuse are contained in Appendix D, pp. A22 to A32.)

The trial court consistently refused to sustain objections to counsel's conduct or to caution counsel to cease or to caution the jury to disregard the same.

The jury returned a verdict in favor of the respondent, which was upheld by the Appellate Court and Supreme Court of Illinois.

Your petitioner raised timely objections in the trial court to respondent's motion to suppress her prior statement and to other conduct complained of. The petitioner again assigned these matters as error in his appeals to the Appellate Court and Supreme Court of the State of Illinois.

On December 17, 1969, the petitioner filed a Petition for Rehearing in the Supreme Court of Illinois explicity setting forth the Constitutional grounds herein relied upon, which Petition for Rehearing was denied without opinion. (Appendix C, p. A13, *infra*) by the Supreme Court of the State of Illinois on January 26, 1970.

REASONS FOR GRANTING THE WRIT.

I.

To the best of our knowledge the United States Supreme Court has never passed upon the constitutionality of those aspects of trial procedure in civil cases presented in this petition. Although the right to cross-examine witnesses, the right to receive a trial free of bias, passion and prejudice; the right of litigants to have their cases fairly heard and the issues justly determined by a jury; and the right to equal protection and the enjoyment of universally recognized privileges and immunities are inherent to both parties in every civil trial throughout the United States, this Court has, we believe, never presented any guidelines and has

never considered the constitutional aspects of the right to cross-examine adverse parties in civil cases or the right to have one's case presented to a jury free of limitless, unbridled and flagrantly prejudicial argument, unreprimanded and unimpeded by the trial court.

The result of the apparent neglect of the United States Supreme Court to pass upon these issues has been the deprivation of fundamental rights to litigants by a laxity of the state court system in upholding and enforcing fundamental constitutional rights, confident in the knowledge that they will not be reviewed by the United States Supreme Court.

> "The idea of procedural due process is reflected in the statement that it is a rule as old as the law that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity lacks all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is fairly administered." 16 Am. Jur. 2d, page 942.
>
> "The United States Supreme Court has never attempted to define with precision the words 'due process of law,' and in fact the phrase probably never can be defined so as to draw a clear and distinct line, applicable to all cases, between proceedings which constitute due process of law and those which do not, because the definition in each case depends not so much upon the quality of the act as upon the relation of the particular law authorizing it to the fundamental law which limits the power of the legislature.
>
> "It has been said that the term 'due process of law' asserts a fundamental principle of justice, rather than a specific rule of law, and thus is not susceptible of more than a general statement of its intent and meaning, which are ascertained in the history of its specific applications to cases requiring judicial decision. Rep-

> resenting as it does a living principle, due process is not confined within a permanent catalog of what may at a given time be deemed the limits or essentials of fundamental rights." 16 Am. Jur. 2d, page 937.

We respectfully submit that unless the United States Supreme Court now, after many years, does not grant some specific guidelines and some specific definition as to the questions presented in this petition, that "fundamental fairness" guaranteed by the United States Constitution may frequently be nothing more than a mere platitude in the administration of justice throughout the 50 states of the Union.

II.

The Supreme Court of the State of Illinois, in interpreting and applying its own rules (which have the force of statutory law in Illinois) in such manner as to bar the plaintiff in this civil case from cross-examining the defendant on crucial issues previously testified to by the defendant on her own behalf, violated the Fourteenth Amendment to the United States Constitution (a) by being inconsistent with due process of law; (b) by denying the plaintiff equal protection of the law; (c) by, in effect depriving plaintiff of trial by jury, as guaranteed by Article II, Section 5 of the Constitution of the State of Illinois; and (d) by enforcing a rule of court, having the force and effect of statutory law, in such manner as to abridge the privileges and immunities of citizens of the United States.

The Illinois Supreme Court in holding that the petitioner may not impeach the respondent's testimony at the trial by means of prior diametrically contradictory statements on material issues is encouraging and promotive to the progress and advancement of perjury and concealment and will derogate and impair justice and the ascertainment of truth in civil litigation. The Illinois Supreme Court has

completely ignored all of the precedents from other jurisdictions (Federal and State) as well as the precedents of the State of Illinois. Not only was the defendant enabled to insulate herself from the truth seeking processes and to hide from the jury the fact that the defendant had previously contradicted her testimony in a diametrically opposite manner on every material issue in the case but defendant's attorney was allowed to capitalize upon the suppression of this material evidence and to argue to the jury that defendant was all the more trustworthy because she had not been contradicted.

In the case of *Greene* v. *McElroy*, 360 U. S. 474 (1959) this Court held that the right to cross-examine witnesses was an immutable principle of our jurisprudence, stating that this right is most important where the evidence consists of testimony of individuals whose memory might be faulty or who might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. This Court recognized that the right to cross-examination is of fundamental importance, quoting from Professor Wigmore, at page 497 of the opinion:

> "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination, as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength and lengthening experience."

In *Pointer* v. *Texas*, 380 U. S. 400 (1965) this Court held that the right to cross-examine witnesses in criminal cases was made applicable to the States via the Fourteenth Amendment to the United States Constitution, stating at page 404:

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of law suits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."

The opinion in the *Pointer* case noted with approval the opinion of Mr. Justice Stone, writing for the court in *Alford* v. *United States*, 282 U. S. 687, 692, declaring that the right of cross-examination is "one of the safeguards essential to a fair trial" and again at page 405, stating:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guaranty of due process of law."

And in a concurring opinion in the *Pointer* case, Mr. Justice Goldberg stated at page 414:

> "I adhere to and support the process of absorbtion by means of which the Court holds that certain fundamental guarantees of the Bill of Rights are made obligatory on the States through the Fourteenth Amendment . . . the Fourteenth Amendment protects the fundamental liberties of individual citizens, it is noteworthy that there is a large area of agreement, both here and in other cases, that certain basic rights are fundamental,—not to be denied the individual by either the State or Federal Governments under the Constitution."

There can be no question but that judicial action in private disputes is a form of State action to which the Fourteenth Amendment is applicable and that States are prohibited from using their courts to abridge the privileges and immunities of citizens and from denying equal protection of its laws to any person. *Hosey* v. *Club Van Cortland*, 299 F. Supp. 501 (U. S. D. C., S. D. N. Y., 1969).

The paucity, the virtual non-existence, of decisions in this most important area of civil litigation cries out for attention to bring to this area of the law the same attention this Court did in the case of *Willner* v. *Committee on Character*, 373 U. S. 96 (1963) wherein you stated on page 103:

> "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood."

Rules of evidence are not innocuous procedural superfluities. They are direct ways of controlling juries and manipulating the outcome of a trial. "It is well known that the extensive and highly refined rules of evidence have developed largely as methods of controlling juries." Moore's Federal Practice, § 43.02(3). While certain exclusionary rules are essential to prevent juries from reaching erroneous conclusions, it is obvious that they are not to be used to induce erroneous conclusions.

> "The realization has slowly grown that the only universal rules of evidence are the rules of relevancy and materiality. When these rules are applied by a court or jury with average power to judge credibility better results are apt to be attained than by the use of many technical and refined rules that (1) either exclude reliable evidence of sound probative value, or (2) are so difficult in application, that their method of application can be drawn in question . . ."
>
> "The Rules have attacked the problem on many

> fronts. Indirectly the pleading rules and the rules on depositions and discovery strike with telling force." Moore's Federal Practice, *Ibid.*

The following cases have held that the right to cross-examine is a fundamental right guaranteed to citizens of the various states, via the Fourteenth Amendment: In re *Aughenbaugh*, 125 F. 2d 887 (CCA, Third Circuit, 1941); *Radic* v. *Fullilove*, 198 F. Supp. 162 (U. S. D. C. for the N. D. of Calif., 1961); *L. B. Wilson, Inc.* v. *Federal Communications Com'n*, 170 F. 2d 793 (D. C. Ct. of App., 1948); *Jenkins* v. *McKeithen*, 89 S. Ct. 1843 (1969); *Southern Garment Mfrs. Ass'n, Inc.* v. *Fleming*, 122 F. 2d 622 (U. S. Ct. of App. for the D. C., 1941); *United States* v. *Dillman*, 146 F. 2d 572 (Ct. of App., Fifth Circuit, 1944); *Hooley* v. *United States*, 209 F. 2d 219 (Ct. of App., First Circuit, 1954); *Philadelphia Co.* v. *Securities and Exchange Commission*, 175 F. 2d 808 (Ct. of App., D. C. 1948).

The foregoing cases are summed up very succinctly in *Derewecki* v. *Pennsylvania Railroad Company*, 353 F. 2d 436 (Ct. of App., Third Circuit, 1965), at page 442:

> "We realize that the right of cross-examination inheres in every adversary proceeding and that it is established beyond any necessity for citation of authorities, with certain exceptions not pertinent here, that if cross-examination of an available witness is not had the litigant, deprived of cross-examination, has been denied due process of law."

Although the United States Supreme Court has ruled rather frequently concerning due process, the right to confront witnesses and the right to cross-examine witnesses in administrative proceedings and in criminal matters, this Court has never (to the best of our knowledge) ruled upon these constitutional rights in civil litigation. By virtue of this lack of direction, state courts have been and continue to run rampant over constitutional rights of litigants

in civil cases by means of arbitrary, capricious, thoughtless and unfair rulings. The intolerable situation will continue until state courts are made aware by this court that there is a constitutional limitation upon arbitrariness and that constitutional fundamental due process does exist in civil litigation.

III.

The Supreme Court of the State of Illinois has approved direct appeals to the bias and prejudice of the jury in the most flagrant and direct manner and has ignored all prior contrary precedent of courts of review of the State of Illinois and has thereby denied to your petitioner the protection granted by the Fourteenth Amendment to the Constitution of the United States (a) by denying your petitioner due process of law; (b) by denying petitioner equal protection of the law, (c) by, in effect, depriving petitioner of trial by jury, as guaranteed by Article II, § 5 of the Illinois Constitution; and (d) by abridging the privileges and immunities of a citizen of the United States. The Illinois Supreme Court has sanctioned conduct during trial which was so extremely prejudicial, abusive and vindictive as to prevent any jury from forming a fair and unbiased verdict.

To the best of our knowledge, the United States Supreme Court has never entered a ruling in the area of civil litigation here under discussion. We fully realize and understand the reasons therefor, the burdensome and limitless sea the Court would seem to be embarking upon. Nevertheless, this Court has in the past ruled where decision was required and by so doing has preserved that fundamental fairness required by the Constitution.

Due process requires that the tribunal be fair and impartial (16 Am. Jur. 2d 582). Arbitrary action by the

tribunal in hearing a cause violates fundamental due process (16 Am. Jur. 2d 575). Essential fairness in trials is a constitutionally guaranteed right. Due process embodies the differing rules of fair play which, through the years, have become associated with differing types of proceedings. *Hannah* v. *Larche*, 363 U. S. 420.

> "A state may regulate the procedure of its courts in accordance with its own conception of policy and fairness *unless it offends some principle of justice ranked as fundamental . . .*" 16 Am. Jur. 2d 944, *Bute* v. *Illinois*, 333 U. S. 640.
>
> "What state procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and history is relevant to these inquiries." 16 Am. Jur. 2d 946.
>
> "The proceeding or hearing requisite to due process must be appropriate, fair, adequate, and such as is practicable and reasonable in the particular case. It must be an orderly proceeding adapted to the nature of the case, in which the person to be affected has an opportunity to defend, enforce, and protect his rights." 16 Am. Jur. 2d 975, 976.

In reaching its decision, the Illinois Supreme Court has ignored every previous precedent of the State of Illinois. The Illinois Supreme Court has ruled that a party litigant may ask the jury to judge the law suit as if they were a party litigant on trial for their lives or involved in a personal injury suit and has approved defendant's counsel asking the jurors to place themselves in the position of the defendant concerning certain elements of the case. Such an appeal, of necessity, can be directed only to the sympathy, bias, passion and prejudice of the jurors. If a juror were to consider himself in the position of one of the party litigants, by definition that juror would be biased or prejudiced in his consideration of the case.

The Illinois Supreme Court sanctioning of defense counsel's vindictive personal attack upon the plaintiff and his attorney, during closing argument, urging that the plaintiff and his counsel were attempting to pervert testimony, suppress evidence and suborn perjury and fraud is a gross violation of fundamental fairness guaranteed by the United States Constitution to every litigant. Defendant's counsel having launched a vituperative attack upon the plaintiff's attorney, having accused the plaintiff and his attorney in so many words of attempting to "pervert their testimony", having constantly urged the jury to believe that plaintiff and his attorney had urged independent witnesses to alter their testimony and that the witnesses had tried to alter their testimony but that the truth was brought out by defendant's attorney himself upon cross-examination, having urged that plaintiff's attorney had in other ways attempted to twist and alter the true picture of the circumstances, for instance by use of improper photographs (none of which is substantiated by the record but is in fact refuted by the record), the case was then so prejudiced against the plaintiff that it could no longer expect a fair and reasonable consideration of the evidence to which he is, at least theoretically, guaranteed under the Constitution of the United States of America.

In the case of *Buttny* v. *Smiley*, 281 F. Supp. 280 (U. S. Dist. Ct. for the Dist. of Colo., 1968), the court stated at page 286:

> "The test of whether or not one has been afforded procedural due process is one of fundamental fairness in the light of the total circumstances . . . . . That case held, consistant with other legal authority, that no particular method of procedure is required for due process, but what is required is . . ." (3) An orderly hearing adopted to the nature of the case; and (4) A fair and impartial decision."

Constitutional guarantees are meaningless words if they are not given effect and enforced. Your petitioner has not received a fair trial in accordance with due process of law, equal protection of the laws, trial by jury and in accordance with the privileges and immunities of citizens of the United States.

CONCLUSION.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Illinois.

Respectfully submitted,

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APPENDIX A.

(Opinion and judgment of the Appellate Court of Illinois, First District, rendered October 23, 1968.)

This action had its origin on January 3, 1965, at about 7:45 P. M., when the plaintiff, Edward Bruske, sought to walk across a busy street in the city of Peru at a point other than a marked pedestrian crosswalk. There is conflict as to whether he was struck by a car driven by defendant, Judith A. Arnold, or whether he walked into its side. In any event, plaintiff brought suit in the circuit court of LaSalle County to recover for personal injuries, and here appeals from a verdict and judgment for defendant. His contentions are that he was prejudiced by a special interrogatory given on defendant's behalf; that the trial court erred in refusing to permit defendant's impeachment on the basis of a prior and purportedly inconsistent statement; and that the closing argument of defendant's counsel was improper and prejudicial in many respects.

The disputed special interrogatory, given at defendant's request over plaintiff's objections, was as follows:

> "Was the plaintiff, Edward Bruske, in the exercise of ordinary care for his own safety before and at the time of the occurrence?"

Consistent with its general verdict for defendant, the jury returned a "No" answer to such interrogatory.

For reasons more fully explained in the opinion of this court in *DeBolt* v. *Wallace*, 56 Ill. App. 2d 380, it must be agreed that the special interrogatory was incomplete and improper for its failure to include the additional element of whether plaintiff's negligence proximately contributed to his injuries. (*C.f. Moyers* v. *Chicago & Eastern Rail-*

road Co., 43 Ill. App. 2d 316.) At the same time, however, we cannot say on this record that it was so prejudicially erroneous as to require a reversal. While not a conclusive cure of the error in the interrogatory, the jury was fully instructed on proximate cause and when that circumstance is laid beside the evidence there is little reason to conclude that the jury was misled or confused by the deficiency in the special interrogatory. In our opinion the weight of the evidence supports the finding that plaintiff was guilty of contributory negligence, and the only reasonable conclusion with the jury could have reached from the same evidence was that such negligence was a proximate cause of plaintiff's injuries.

Circumstances surrounding the unique impeachment issue raised in the appeal show that for many months prior to August 30, 1966, counsel for defendant had made an appearance in the case and had formally engaged in pretrial activities. On the day named, without notice to anyone and despite the knowledge that defendant was represented by counsel, a private investigator employed by plaintiff's counsel appeared at the home of defendant with a court reporter and took a question and answer statement from defendant concerning the accident involved in the pending litigation. At the trial a motion of defendant to suppress the statement of August 30, 1966, was granted *in limine*, the remarks of the trial court indicating his ruling to have been based upon a belief that the statement had been unfairly and unethically procured. Later, the court refused a proffer by plaintiff of portions of the statement claimed to be inconsistent with defendant's testimony at the trial.

We are first met here by arguments and counterarguments as to whether the portions of the statement relied upon by plaintiff in fact serve to impeach defendant's trial testimony. And while we lean to the view that

the statement, when read in its entirety and in proper context, is not materially contradictory, we feel the impact of the manner in which the statement was obtained could have upon future litigation makes it incumbent upon us to determine the primary issue of whether the trial court properly suppressed defendant's statement.

To support his contention that the court erred, plaintiff relies upon the principle, propounded by many authorities, that even though evidence may have been obtained illegally it is nonetheless admissible in a civil action if it is relevant to the issues of the case. Justification for the rule is founded upon the notions that the ascertainment of the truth is more important than the manner in which the evidence was obtained, and that to conduct collateral inquiries into the manner in which evidence was acquired would, as Wigmore puts it, "jeopardize the primary litigation by delaying, interrupting, confusing and sometimes frustrating it." (See: 8 Wigmore on Evidence (1961 Ed.), sec. 2183; 29 Am. Jur. 2d, Evidence, sec. 408, pp. 466-467; *Mossman* v. *Thorson*, 118 Ill. App. 574, 576; *Thanhouser* v. *Milprint, Inc.*, 192 N. Y. S. 2d 911.) However, none of the authorities or decisions presented to us are precisely applicable, and to our minds there are far deeper considerations than a mere rule of evidence presented by the instant case.

For many years now, once litigation has been filed and all parties have appeared, the pretrial search for, and disclosure of, matters relevant to the issues of the subject matter involved in the pending litigation has been controlled by discovery rules promulgated by our Supreme Court. They are presently found in Rules 201 through 219, Part E, Article II of the Illinois Supreme Court Rules. (Ill. Rev. Stat. 1967, chap. 110A, Rules 201 thru 219.) And while the decisions of the court leave little doubt that their primary purpose is to permit the parties to seek out the truth unfettered by technical avoidances (e.g. *Monier*

v. *Chamberlain*, 35 Ill. 2d 351; *People ex rel. General Motors Corp.* v. *Bua*, 37 Ill. 2d 180), we believe the rules were also intended to have the equally important purpose of fixing the guidelines for a fair and orderly procedure by which discovery may be accomplished. Indeed, Rule 201 (c) specifically provides for protection against abuses, which may be equated with unfairness, through the media of protective orders or court supervision. Still another protection, which we feel has significance here, is the direction of Rule 201 (d) that discovery may not be initiated "prior to the time all defendants have appeared or are required to appear." The logical inference is, we believe, that the attorney for defendants must be dealt with in accomplishing discovery. With specific reference to oral depositions, and again for the undoubted purpose of insuring fairness and protection, Rule 206 ordains that a party desiring to take a deposition shall "serve notice in writing a reasonable time in advance on the other parties," while Rule 207 requires the deposition to be signed by the deponent and authenticated by the officer before whom it is taken. These are not mere idle directions, for the rules of the Supreme Court have the force of law when adopted. *Harris* v. *Annunzio*, 411 Ill. 124; *Department of Finance* v. *Sheldon*, 381 Ill. 256.

Viewed from the standpoint of stark reality, what plaintiff's counsel did here was to cause defendant's deposition to be taken on oral examination without prior notice to anyone, and in complete disregard of Canon 9 of the Canons of Ethics adopted by the Illinois State Bar Association which provides in pertinent part: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; * * *." As could be expected, the resulting statement was accomplished to some degree by leading questions. Under the circumstances that an action had been filed and counsel had appeared for

defendant, and limiting ourselves to the matter of taking such a statement from a party, as distinguished from some other person, we are of the opinion that the trial court properly suppressed defendant's statement and correctly refused to receive the portions of it proffered in evidence. To hold otherwise would not only condone unethical practice but, more importantly, would reduce the requirements for fair and orderly procedure found in the discovery rules for empty platitudes. We believe it would produce chaos and be derogatory to the best interests of the public, the courts and the profession to give sanction to a practice whereby a party to pending litigation may be questioned by opposing counsel or his agents without notice, restriction or inhibitions by rules of practice and canons of ethics.

In an extensive attack on the final argument of counsel for defendant, it is now urged by plaintiff that the argument was "irreparably prejudicial" because counsel: (a) asked the jurors to place themselves in the position of defendant; (b) argued his personal experiences as an attorney; (c) launched a vindictive attack on plaintiff and his attorney; and (d) implied that plaintiff had been drinking although the court had eliminated the issue from the trial. While we think these claims are exaggerated to some degree, it is sufficient to point out that these matters are not open to our consideration in this case. In none of the instances of which complaint is now made did plaintiff object, seek a ruling or move for a mistrial. He thus waived the alleged error and cannot complain for the first time on review. (*Lindroth* v. *Walgreen Co.*, 338 Ill. App. 364, 383-384, aff'd. 407 Ill. 121, 136; *Pearmon* v. *Morris*, 15 Ill. App. 2d 486, 499; *Andres* v. *Green*, 7 Ill. App. 2d 375; *McElroy* v. *Force*, 38 Ill. 2d 528.) We are not unmindful that the rule has an exception where the argument of counsel is so inflammatory and prejudicial as to deteriorate the judicial process and deny a fair trial. (*Belfield* v. *Coop.*

8 Ill. 2d 293; *City of Chicago* v. *Pridmore*, 12 Ill. 2d 447; *City of Quincy* v. *V. E. Best Plumbing & Heating Supply Co.*, 17 Ill. 2d 570.) From our examination of the entire record, however, particularly the arguments of counsel, we cannot say the remarks now complained about were so materially prejudicial as to warrant our intervention.

Additional charges levelled at the closing argument of defense counsel are that it misrepresented and contradicted the testimony of the plaintiff, and that, with no basis in the evidence, the jury was told that plaintiff's attorneys had directed independent witnesses not to talk to defense counsel. These contentions are arrived at, however, only by undue selectivity from the record, and in our opinion the trial court did not abuse its discretion in overruling plaintiff's trial objections. Defendant had a right to argue on the basis of evidence adduced from the cross-examination of plaintiff, and was not confined to what was stated on direct examination as plaintiff's posture here necessarily assumes. Again, while one witness did deny that he had been told not to talk to defense counsel, other portions of the record sustain defense counsel's argument that such a tactic was pursued. Within this point of argument it is also contended that the testimony of other witnesses was contradicted and misrepresented; however, in these instances proper and timely objections were not made in the trial court so as to preserve the contentions made for review.

The ultimate question on review is not whether a trial was scrupulously free from error, but whether there was error which operated to the prejudice of the appealing party or unduly affected the outcome below. (*Nelson* v. *Union Wire Rope Corp.*, 31 Ill. 2d 69, 118.) Applying that test here we find no reason to disturb the judgment appealed from and it is therefore affirmed.

JUDGMENT AFFIRMED.

APPENDIX B.

(Opinion and judgment of the Supreme Court of the State of Illinois, rendered November 26, 1969.)

Mr. Justice Kluczynski delivered the opinion of the court:

On January 3, 1965, while walking across a busy street in the city of Peoria, plaintiff, Edward Bruske, sustained serious injuries when he was struck by an automobile driven by defendant, Judith A. Arnold. His suit to recover for these injuries, instituted in the circuit court of LaSalle County, resulted in a verdict and judgment for defendant, and plaintiff appealed. The Appellate Court, Third District, affirmed (100 Ill. App. 2d 428), and we granted leave to appeal.

The principal issue raised involves the trial court's refusal to allow the plaintiff to impeach the defendant on the basis of an allegedly inconsistent statement made prior to trial to an investigator used by the plaintiff. Although it is debatable whether the statement serves to impeach the defendant's trial testimony, we elect, as did the Appellate Court, to rule on the propriety of its suppression because of the importance of this issue to future litigation.

The factual background against which this impeachment issue is framed is fully set out in the Appellate Court opinion. All that need be noted for coherent discussion is that the statement was given to a private investigator hired by plaintiff's counsel prior to trial but subsequent to the filing of the lawsuit and the appearance of defendant's counsel. The statement was taken at defendant's home, without notice to her counsel despite plaintiff's counsel's knowledge

that she was so represented. The statement consisted of a series of questions, usually leading, and answers, and was transcribed by a court reporter. Pursuant to defendant's motion at trial, the trial judge suppressed the statement for all purposes, including impeachment, indicating he considered it to have been illegally and unethically procured.

To overturn his ruling, plaintiff advances two alternative arguments. He contends that the statement was not obtained illegally as no attempt was made to mislead the defendant, or even if obtained illegally it is nonetheless admissible.

In our courts, once a lawsuit has been filed, and all parties have appeared, the pretrial search for matters relevant to the pending litigation is controlled by discovery rules promulgated by this court. (Rules 201-219, 36 Ill. 2d 54-82, Ill. Rev. Stat. 1967, ch. 110A, pars. 201-219). These rules, which have the force of law (*Harris* v. *Annunzio*, 411 Ill. 124), provide, *inter alia*, that discovery may not be initiated "prior to the time all defendants have appeared or are required to appear" (Rule 201(d)) and that proper notice be furnished in writing upon the other parties when depositions are sought to be taken. (Rule 206(a).) To implement the enforcement of such directions, Rule 201(c) empowers the court to "make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." In addition to our rules, Canon 9 of the Canons of Ethics adopted by the Illinois State Bar Association, provides in pertinent part: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; * * *." From a mere recitation of the pertinent provisions of our rules and Canon 9 of the Canons of Ethics, we think it manifest that the statement complained of must be considered to have been illegally obtained. No serious argument

against such conclusion may stand, as it makes slight difference that the statement of a party was taken by an agent of plaintiff's counsel rather than counsel himself. The real question, therefore, becomes whether, notwithstanding this illegality, the statement should have been admitted.

Support for its admission may be found both in case law and respected treatises on evidence. (See 8 Wigmore on Evidence, 1961 Ed., sec. 2183; Jones, Laws of Evidence, 5th Ed., Vol. 14 (1958) par. 868; *Thanhouser* v. *Milprint, Inc.*, 192 N. Y. S. 2d 911; *Walker* v. *Penner*, 190 Ore. 542, 227 P. 2d 316.) The rationale for admissibility rests upon the idea prevalent at common law, that the importance of ascertaining the truth overrides the manner in which evidence is obtained, and that collateral inquiries made at trial into the manner of obtaining it merely delay and frustrate the primary litigation. It is our opinion, however, that such common-law notions, no matter how well documented or oft-repeated, must yield in this situation to the controlling language of our rules of discovery and the prohibition expressed by Canon 9.

In reaching this opinion, we are not unmindful that rules of discovery should not necessarily operate as exclusionary rules of evidence or that separate procedures exist for the regulation and discipline of unethical conduct on the part of attorneys. Rules, however, to be effective must carry an appropriate sanction; otherwise, the orderly process of a lawsuit is left to the mercy of the individual's sense of justice. We deem that the appropriate sanction in this instance was the exclusion from evidence of the statement. Accordingly, we hold that the suppression of the statement was proper.

Plaintiff next charges that the trial court erred in giving the following special interrogatory: "Was the plaintiff, Edward Bruske, in the exercise of ordinary care for his

own safety before and at the time of the occurrence?" Consistent with its general verdict, the jury returned a "No" answer to this interrogatory. Plaintiff argues, and we must agree, that the interrogatory is defective because it fails to include the additional element of whether his (plaintiff's) negligence proximately contributed to his injuries. We do not, however, regard such defect as reversible error. The jury was fully adequately instructed on the law concerning contributory negligence, including the requirement of proximate cause. While not a complete cure for the faulty interrogatory, when these instructions are viewed together with the evidence in the case, there is little indication that the jury was confused by the interrogatory to the detriment of the plaintiff.

It is finally contended that the closing argument of defendant's counsel was improper and prejudicial. More specifically, it is urged that defense counsel improperly: (1) argued his personal experiences as an attorney; (2) asked the jurors to place themselves in the position of the defendant immediately prior to the accident; (3) suggested that plaintiff's attorneys would use distorted evidence in support of his case, and (4) implied that plaintiff had been drinking although the trial court had previously excluded this issue from the trial. None of these instances now relied upon for reversal, however, were objected to at trial and must therefore be considered waived. (*McElroy* v. *Force*, 38 Ill. 2d 528.) It is true that this rule of waiver would not apply where the argument of counsel is so inflammatory and prejudicial as to deteriorate the judicial process. (*Belfield* v. *Coop*, 8 Ill. 2d 293.) And it is also true that once an objection has been made, and a ruling obtained, it is not necessary to repeat the same objection to preserve the point for review. But from our reading of the record, including the closing argument of both sides, we see no reason to relax the waiver principle in this case. The only

reference made to drinking was that plaintiff had stepped off the sidewalk after emerging from the doorway of a tavern. The location of the tavern door in relation to plaintiff's route across the street was a fact in evidence. It is evident that reference to the tavern was made for the purpose of showing that plaintiff was not walking in a crosswalk when struck rather than suggesting that he had been drinking. Similarly, the request of the jurors to ask themselves what they would have done under the circumstances to avoid the accident does not appear designed to make them sympathetic to the defendant's cause. On the contrary, such request seems perfectly consistent with the ultimate task of the jury: namely, to apply "the reasonable man" standard to the defendant's conduct.

Closely tied to the charge concerning statements made about the willingness of plaintiff's counsel to use perverted evidence are plaintiff's additional charges that the defense's closing argument grossly misstated his testimony and erroneously accused his counsel of telling witnesses "not to talk" with lawyers for the other side. Timely objections were made to these remarks and they therefore merit close inspection.

A review of the entire record convinces us that the evidence does not justify the accusation that plaintiff's counsel told witnesses not to speak with opposing counsel or the suggestion that they wanted to use or would use perverted testimony. These statements were improper but not entirely unsupported by the evidence. For example, witnesses did admit to being told they "did not have to talk" with the other side. Furthermore, plaintiff introduced photographs taken from a perspective which made the situs of the accident as testified to by witnesses appear closer to the crosswalk than its true distance. Such examples serve to explain, though not excuse, the statements in question.

With regard to the alleged misstatements of plaintiff's testimony, it must be observed that the defendant was not limited to statements made on direct examination; the defendant could present plaintiff's testimony in the light most favorable to her case. To the extent this presentation might be thought to exceed the limits of permissible advocacy, it was cured by the trial court's cautionary remarks that the jury should decide the case on the basis of the evidence it heard. In addition, plaintiff had the opportunity to rebut any misstatements in the closing argument and did so.

Viewing defendant's closing argument as a whole, it is our opinion that the improprieties alleged do not require a new trial. As the appellate court pointed out at page ....

"'[T]he ultimate question on review is not whether a trial was scrupulously free from error, but whether there was error which operated to the prejudice of the appealing party or unduly affected the *outcome below*. (*Nelson* v. *Union Wire Rope Corp.*, 31 Ill. 2d 69, 118.)" In this instance, we hold that there was not.

For the foregoing reasons, the judgment of the Appellate Court, Third District, is affirmed.

JUDGMENT AFFIRMED.

APPENDIX C.

(Order of the Supreme Court of the State of Illinois entered January 26, 1970, denying Petition for Rehearing.)

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX D.

(References are to the pages as numbered in the trial court record.)

On the evening of January 3, 1965, between 7:30 P.M. and 8:00 P.M., Petitioner Edward Bruske, while a pedestrian crossing Fourth Street near its intersection with Schuyler in the City of Peru, Illinois, was run down by the automobile operated by the Respondent, Judith A. Arnold. (R. 189, 190, 193, 248, 251, 304, 305, 370-380, *et seq.*)

On August 30, 1966, approximately six months before her testimony at the trial, the defendant voluntarily made statements concerning material issues in the case, which statements were directly contrary to her testimony at the trial. These issues went to the heart of the case and were strongly contested at the trial by defense.

The defendant's prior statement contradicted her testimony at the trial concerning the following material issues, among others.

1. From the time the defendant turned right (east), onto Fourth Street, to the moment of impact there were no vehicles going west which could have obstructed her view of the plaintiff and the north curb of Fourth Street. (R. 39-50.) (At the trial the defendant testified that she could not see the plaintiff in the west bound lane because the plaintiff had darted out between vehicles passing to the west immediately prior to the impact of her vehicle with the plaintiff.) (R. 509, 510.)

2. Just prior to the impact, the defendant's attention was diverted when she looked to see if she had cleared a car parked on the southeast side of Fourth Street at its intersection with Schuyler. (R. 39-50.) At the trial the

defendant had testified that nothing had diverted her attention.) (R. 511-539.)

3. The impact occurred as the defendant was making her turn onto Fourth Street. (R. 39.) (At the trial the defendant testified the impact occurred 40 to 60 feet east of the intersection.) (R. 512.)

4. The defendant hit the plaintiff (a pedestrian) with the front of her vehicle. (R. 43-46.) (At the trial the defense claimed the plaintiff walked into the side of the vehicle.) (R. 511-519, 531-552, 642-652.)

5. After the plaintiff landed on the pavement he did not move from that position; he had tried and a bystander kept him down. (R. 43.) (At the trial the defendant testified that the plaintiff had gotten up from the pavement along the left front fender and walked to the front of the defendant's car, which also was contrary to the testimony of the independent witnesses.) (R. 508-539.)

At the trial the defendant moved to suppress the statement for all purposes, including impeachment, which motion was granted. The ground for suppressing the statement was that the attorneys for the defendant were not notified, prior to the statement. A copy of the statement was furnished to the attorneys for the defendant some time prior to the trial. The statement was taken by an independent contractor, Mr. Cy Couet, a member of a private investigating firm, which had investigated the entire case including everybody known to the plaintiff who had an involvement in the case. The questions and answers were taken down and reported by a court reporter, Mr. Raymond O. Estridge, of the reporting firm of Harry O. Nottingham, Inc., 127 North Dearborn Street, Chicago, Illinois, and transcribed. The defendant objected that the taking of the statement was unethical and that the statement should be suppressed in its entirety. The motion was granted.

Additional Argument, Point A of the Petition Concerning Defendant's Prior Contradictory Statement.

In her answer to the petition, Defendant would have this court believe her prior statement was not contradictory to her testimony at the trial.

That the prior statement was diametrically contradictory to material issues going to the core of liability in a closely contested case is illustrated in the following quotations from the record. In fact, the contradictions are so gross as to cause one to wonder if the defendant's testimony at the trial might have been a fabrication.

Among the questions to which the defendant had given contradicting prior statements, are the following:

1. From the time the defendant turned right (east), onto Fourth Street, to the moment of impact there were no vehicles going west which could have obstructed her view of the plaintiff and the north curb of Fourth Street. (At the trial the defendant testified that she could not see the plaintiff in the west bound lane because the plaintiff had darted out between vehicles passing to the west immediately prior to the impact of her vehicle with the plaintiff.)

Statement August 30, 1966:

"Q. How about traffic coming on Fourth, was there any at that time?

A. No.

Q. You were clear to make your turn?

A. Yes. (Vol. 3, p. 40.)

Q. You had stopped there at the corner? (Vol. 3, p. 47.)

A. Yes, I had come to a complete stop, and had waited for several cars to pass, and there was a break in traffic.

Q. *There were no cars coming?*
A. *At least four or five blocks away.*

* * * * *

Q. There was no traffic moving westward at this time causing a glare of headlights? There was no traffic coming the other way? (Vol. 3, pp. 49 and 50.)
A. *I feel like if there was traffic coming the other way I would have waited. As I remember the street was practically all mine.*

Q. *Deserted at that time?*
A. *Yes.*

Q. *From the time you made your turn until this happened there were no cars moving either way?*
A. *I got out of the car and got up to him before any cars* came near us."

* * * * *

Testimony at trial:

"Q. What was the next thing that happened? (R. 508.)
A. Well, the next thing I can remember, the next thing I know, I heard a thump, when I seen a man against my windshield.

Q. *Judith, at that time when you heard this thump, tell the court and jury where those cars were, those cars that you saw, that you were coming left.*
A. *They were passing me at the time.*

Q. Do you know how many cars there were?
A. Five or six at least. (R. 508.)

* * * * *

Q. In relation to the time that the last one of those cars went by, *and I am asking you that at the time the last of those cars went by, when was it that you heard the thump in relation to those—in relationship to that occurrence?* (R. 509.)
A. *Almost immediately.*"

2. Just prior to the impact, the defendant's attention was diverted when she looked to see if she had cleared a

car parked on the southeast side of Fourth Street at its intersection with Schuyler. (At the trial the defendant had testified that nothing had diverted her attention.)

Statement August 30, 1966:

"Q. There were no other people crossing?

A. No, I had looked on the other side of the street, and it was dark over there, and I could see parked cars there, and there were several people up by the show there.

Q. You noticed it was (while, sic.) you were making a turn? (Vol. 3, p. 48.)

A. Yes, I tried to look both ways because of that, and I have no recollection of anyone standing close to the curb, even start to cross the street. *The only thing that I could think of that might have diverted my eyes was to see if I had cleared the car that was parked there.*" (Vol. 3, p. 49.)

* * * * *

"Q. Did he have a cap or hat on or anything? (Vol. 3, p. 42.)

A. No.

Q. His clothing more or less was on the dark side?

A. Yes.

Q. At the time your attention was attracted to the right?

A. Yes, the first time I saw the man he was already hitting the windshield."

Testimony at trial, February 17, 1967:

"Q. You could see in the west bound lanes?

A. Yes.

Q. Did you from that time until the accident happened continue to glance to those westbound lanes?

A. Yes, I did.

Q. *In other words, from the time the automobile went by until the time the occurrence took place, you always had those westbound lanes in your view?*

A. Yes. (R. 531.)

* * * * *

Q. *All of this time you were looking over the front of your windshield with a view of the westbound lanes?*
A. *Yes, sir, I was.*" (R. 532.)

* * * * *

3. The impact occurred as the defendant was making her turn onto Fourth Street. (At the trial the defendant testified the impact occurred 40 to 60 feet east of the intersection.)

Statement August 30, 1966:

"Q. When you got to Fourth and Schuyler there is a stop sign?
A. Yes, I stopped, and I was going to go east, and I looked to see what he was doing, and he had already gone ahead of me, *and when I pulled onto Fourth and as I did I hit him.*" (Vol. 3, p. 40.)

* * * * *

The testimony at trial:

"Q. About how far, going back a little, (R. 511; A. 24.) about how far had you gone from the intersection in relation to the intersection at the time you heard this thump?
A. Somewhere between 40 and 60 feet. I really don't know for sure." (R. 512.)

4. The defendant hit the plaintiff (a pedestrian) with the front of her vehicle. (At the trial the defense claimed the plaintiff walked into the side of the vehicle.)

Statement August 30, 1966:

"Q. The initial point of contact with the automobile would be about where?
A. *Right close to the headlights, he would have hit my bumper, about his knee.*
Q. The headlight and the bumper?
A. *Yes, right on the edge of it.*" (Vol. 3 of the Record, page 43.)

* * * * *

Testimony at trial, February 17, 1967:

"Q. You never saw him come in contact with your automobile other than the time he was against your windshield?

A. No. (R. 531.)

Q. All of this time you were looking over the front of your windshield with a view of the west lanes?

A. Yes, sir, I was." (R. 532.)

* * * * *

Closing argument of defense counsel:

"Now, Ladies and Gentlemen that is why I'm telling you this. They tried to tell you, to make out, to get him in front of the car—they didn't tell you that. . . ." (R. 646.)

"If you recall, he checked the front of the car over and there were no marks on the front of the car . . .

"Now you can take this any way you want to. Just think about it for a moment. If she hit him with the front of the car, and bear in mind in making this argument again—to bring this out again, don't hang up on that; but just to give you the character of the plaintiff's case, a split second between the car being here and here (indicating) in other words, when a man steps out behind a passing car; now, I ask you if she hit him with the front of (R. 647) the car the brush marks would show there is no question about that.

* * * * *

If the marks were on the side of the car, and it bears out her testimony, and the physical evidence here, how did he get around to the front?" (R. 648.)

5. After the plaintiff landed on the pavement he did not move from that position; he had tried and a bystander kept him down. (At the trial the defendant testified that the plaintiff had gotten up from the pavement along the left front fender and walked to the front of the defendant's car, which also was contrary to the testimony of the independent witnesses.)

Statement of August 30, 1966:

"Q. Did he actually come up to the windshield do you know? (Vol. 3, p. 42.)

A. Yes.

Q. And then rolled forward and off?

A. To the side.

Q. Left front of the car?

A. *He started to get up and a pedestrian came over and pushed him back down, and told him to lay back down.*" (Vol. 3, p. 43.)

Testimony at trial:

"Q. Judith, what was he doing when you saw him on his hands and knees there? (R. 510; A. 23, 24.)

A. He was trying to get up.

Q. What did he do?

A. *He got up and moved to the front of my car.*"

* * * * *

Q. Did you see him get up then? (R. 537.)

A. I did.

Q. You saw him walking?

A. Yes, several steps, yes.

Q. He walked . . . from the left front wheel, he walked to a position in front of the car?

A. Yes. (R. 538.)

Q. Under his own power?

A. Yes.

Q. With no aid?

A. No, that's right.

Q. How far did he walk in front of the automobile?

A. Two to three feet.

Q. Could it have been as much as five or six feet?

A. More or less, I didn't measure it."

* * * * *

"Q. Was he standing there? (R. 539.)

A. Yes.

Q. In what direction was he looking?

A. South."

The defendant has referred to Supreme Court Rule 201(c)(1), in which it is stated that the court may make such order as justice requires concerning the regulation of discovery procedures in order to prevent expense, embarrassment, oppression, etc. The section relates to pretrial discovery rather than the admissibility of evidence; however, more important, the section is intended to promote justice. Surely, under the circumstances present in this case, the suppression of the defendant's materially contradictory prior statement would suppress justice rather than promote it. Justice is best served by the ascertainment of the complete truth not by the suppression of truth. Never once did the defendant claim that her prior contradictory statement was untrue or that it was obtained under duress or promise of any advantage. The only real reason for the suppression of the statement was that it revealed the defendant's negligence and contradicted her direct testimony elicited by her own attorney during the trial. Moreover, the defendant's attorney capitalized upon the suppression of this statement by calling the jury's attention to the fact that the defendant's testimony was unimpeached and therefore entitled to more credibility.

(a) *Defendant's attorney stated that the plaintiff had testified that he did not look to the right and did not see defendant's automobile.* (R. 654.)
Plaintiff's actual testimony:

"Q. What was the next thing that occurred after getting to the center? (R. 378.)
A. I looked to the west to see if any eastbound cars were coming.
Q. What did you see?
A. I saw one car passing me.
Q. Did you see anything else?
A. There was a stream of cars coming east about three-quarters of a block down.

Q. And then after this one east car passed what did you do?

A. I proceeded across the street.

Q. And as you proceeded across the street what happened then? (A. 378.)

A. Well I took two or three steps and then out of the corner of my eyes I saw the car on top of me. (R. 379.)

Q. In what direction did you see this car out of the corner of your eyes?

A. It was headed east.

Q. Was it headed right or left of you?

A. My right.

Q. When you saw this car out of the corner of your eyes approximately how far away was it?

A. About ten feet.

Q. What did you do then?

A. I raised my arms and hollered 'O No'. I lifted my right leg and I was hit.

Q. How much time elapsed since you saw this car out of the corner of your eye ten feet away until you were hit?

A. I have no idea, it was almost on top of me.

Q. What part of the car came in contact with you? (R. 379.)

A. The front part. (R. 380.)

Q. Then what happened?

A. As soon as I was hit I was out."

* * * * *

"Q. When you were in the center line of the street and you looked to the right, as you discussed with counsel on cross-examination, did you have any difficulty seeing to your right or to the west on Fourth Street? (R. 422.)

Mr. Kelly: Your Honor I object to that. It is improper redirect examination. (R. 423.)

The Court: He may answer.

The Witness: A. No, sir: it was clear.

Mr. Ozmon: Q. Mr. Bruske, besides the one eastbound automobile that passed earlier, what did you see in your view when you looked to your right, when you were in the center line?

Mr. Kelly: Your Honor, I object to that. Leading and suggestive.

The Court: He may answer.

The Witness: There was a stream of cars eastbound about three-fourths of a block from the intersection.

Mr. Ozmon: Q. When you were at the center line, what is your best approximation how long you remained in the center line in taking a look to the right and waiting for that one car to go by?

Mr. Kelly: Your Honor, I object to that. It has already been asked and answered. (R. 423.)

The Court: He may answer. (R. 424.)

The Witness: A. About two to three seconds."

(b) *Contradiction of the testimony given by Kurt Tredoning.*

Defense counsel's closing argument:

"What did Curt say? *Well, they tried to have him testify. What did they try to have him testify* you would think from the direct examination it was like that the place was lit up like a Christmas tree, or floodlights. . . . What did he say? . . . we had to bring this out. I would say it would probably be difficult to see with his clothing. *It is more or less an alley between Happy's Tavern and the apartment house, and it is usually dark, and I guess he went swinging around there and would not be seen too clearly. Doesn't that have the ring of truth about it,* ladies and gentlemen? *Now, I ask you, did they bring this out? Absolutely not. No, they did not. In other words, they tried* — or they were trying to keep this away from this alleyway." (R. 637; 638.)

"*Now, take the witness Kurt. Now, I remind you, ladies and gentlemen there is no reason for this if you*

are bringing out the truth. They asked him where Bruske was crossing the street. They got it down to about ten feet. (R. 638.)

* * * * *

Actual testimony of Kurt Tregoning:

"Q. What particular type of lights were in that particular area as of that time? (R. 245.)

A. Well, those are those fog lights used for good lighting ability for fog.

* * * * *

Q. With those lights in operation what was the condition or what was the general condition of lighting in this vicinity at the Dairy Bar on Fourth Street?

A. Well, fairly well lit up. (*Et seq.* 246, 247.)

* * * * *

Q. When you saw him at that time in the westbound lane can you approximate or give your best estimate in feet where that was in reference to the eastbound lane of Schuyler Street? (R. 250.)

A. Approximately ten to fifteen feet or a car length.

Q. And when you saw him in that position what was he doing?.

A. He was walking across the street."

In regard to counsel's closing statement to the jury, implying the plaintiff came out of an alley near a tavern, the following occurred during cross-examination:

"Mr. Oxmoor: Your Honor, I object to that. . . . It is making a reference to a completely different location. (R. 282.)

* * * * *

"The Court: We are not concerned whether or not he could be seen in the alley, we are concerned with the visibility on the street. (R. 283.)

Mr. Kelly: It is the location where he saw him.

The Court: I didn't hear that in the question.

Mr. Kelly: 'I would say it would probably be difficult . . .'

The Court: No, that is his answer.

Mr. Kelly: He said, 'He could been, seen clearly because of his clothing? That is the question, and in the answer he gets into this location.

The Court: I will sustain the objection. Strike out the answer and read from the witness's previous testimony." (R. 283.)

* * * * *

Q. Was the pedestrian, Mr. Bruske, at any time when you saw him near this alley? (R. 297.)

A. No."

(c) *Contradiction of the testimony given by Raymond Rodda.*

Defense Counsel's Closing Argument:

"Now, with the witness Rodda *they had him say that it* was about ten feet from the crosswalk. *Looking at the distorted photograph*, ten feet from the crosswalk. . . ." (R. 639.)

Now, on speed with the witness Rodda *they had that boy fifteen miles an hour or more.* What did he say? I had to bring it out by their own lengthy statement taken from him, which they didn't mention to you . . ." (R. 639.)

"Now, they had Rodda there with this ten feet business, as I remember it, and they ask you what did he say?

"He said in the statement which he had given that Bruske was crossing about *twenty yards* east of the crosswalk . . ." (R. 640.)

"Now, just remember what the policeman testified to. He testified that he stepped off from the curb line and that it was sixty feet. The difference would be about eight feet, if the witness Rodda said it was *twenty yards*, which is lot closer to what the boy thought it was there than the ten feet they had him testify to from the witness stand." (R. 641.)

* * * * *

Actual testimony of Raymond Rodda:

"Q. With reference to the east curb line over here (indicating) alongside of the tavern do you know approximately how far it is from the east curb line to the point where you saw the pedestrian start to cross? (R. 196.)

A. Yes, sir.

Q. About how much is that?

A. About twenty *feet*.

Q. With relation to this crosswalk in Plaintiff's Exhibit No. 3 and referring to the east edge of that crosswalk do you know approximately how far it is to the east of where you saw the pedestrian start to cross? (R. 197.)

A. Yes, sir.

Q. Approximately how far is that?

A. Approximately seventeen *feet*.

The Court: What was your answer?

The Witness: Approximately seventeen feet.

The Court: Seventeen feet?

The Witness: Yes, sir."

(d) *Defendant's counsel, in his closing statement, told the jury that plaintiff and his attorneys had directed independent witnesses not to talk to defense counsel. This was contrary to the evidence and extremely prejudicial in the manner used by defense counsel.*

Defense Counsel's Closing Argument:

"Well, I ask you what happened? And they callously admitted as to the plaintiff here, the young man sitting here that works for Mr. Ozmon when these witnesses were called out there and Mr. Ferracuti took copies of the statements out to show those boys, which is only fair, of the statements they had given us: *what did he say? Don't talk to anybody. Don't talk to him.* You don't have to talk to him. *Stay away from him.* (R. 641, 642, *et seq.*)

"It was foolish on their part. *They wanted to per-*

vert their testimony, and I say that they didn't want to do it—that is the impulse at the moment. They had gone over these things with these boys; and this ten feet down there when they say—they having had copies of the statements, which we were compelled by rule to give to them, when they think about that they say, *'Don't talk to them.' Now, I ask you, is that justice?* (R. 642.)

"I might remind you, Ladies and Gentlemen, that I have never in my experience in trying law suits told a disinterested witness that you don't have to talk to the other side, stay away from them.

"Let me ask you, *how would you like to be a litigant in a law suit and have John Doe say to you whether or not you were on trial for your life or involved in a personal injury to have the other opposing counsel go to that person and say to them, 'Don't talk to them. Don't tell them anything. Don't* (R. 642) *go to them at all—*"

* * * * *

Testimony of Raymond Rodda:

"Q. Did Mr. Ozmon or any gentleman tell you not to talk to him? (Mr. Ferracuti.) (R. 221.)

A. He told me I didn't have to.

Q. . . . Let me ask you, did this gentleman who is with Mr. Ozmon, he is in the courtroom now over there, didn't he come up to you and tell you that you didn't have to talk to Mr. Ferracuti, or in words to that effect? (R. 221; A. 11.)

A. Yes. (R. 222.)

Q. In fact, he told you not to talk to him, isn't that right?

A. *No, he didn't.*"

The witness had in fact given his statement to the defense attorneys on June 9, 1965. (R. 224.)

(c) *Contradiction of the testimony of Wallace Reese.*

Defense Counsel's Closing Argument:

"Mr. Kelly: Now, Ladies and Gentlemen, also with Mr. Reese . . . What did he say? If you will remember he said that *he was walking across the street at a sharp diagonal with a good part of his back, which had turned at an angle this way (indicating) that is what he said.*" (R. 643.)

Actual testimony of Wallace Reese:

"Q. As he was walking across the street in that sharp angle was a good bit of his back toward the west? (R. 322.)

A. *I would say no. No, I would say no.*"

(f) *Contradiction of the testimony of Raymond Stachowiak.*

Defense Counsel's Closing Argument:

"Now, Ladies and Gentlemen, that is why I am telling you this. They tried to tell you, to make out, to get him in front of the car. It was when he was in front of the car—they didn't tell you that—the policeman, which you recall his testimony—*the policeman put him to the left* which bears out Judith's testimony about that. That is an argument that is irrefutable, can't be rejected." (R. 646.)

* * * * *

Actual testimony of Raymond Stachowiak:

"Q. In other words, what you are telling us about is where you found the pedestrian after everything came to a standstill? (R. 446.)

A. Yes.

Q. *The pedestrian was in front of the automobile?*

A. Yes. As I said before, *he was to the front and slightly to the left.*"

(g) *Contradiction of the medical testimony.*

Defense Counsel's Closing Argument:

> "It was brought out that the weight bearing bone, the shin bone, wasn't hurt at all, *and that this bone, the outer bone, which you could almost do without, wasn't fractured, and it healed, and there was no disability whatsoever.*" (R. 660.)

* * * * *

Actual testimony of Dr. William Scanlon:

> "A. . . . The fracture is just a long, small bone here (Indicating), which is called the fibula. (R. 341.)
>
> * * * * *
>
> Q. This fracture which you have pointed out, to us is approximately how far below the knee joint?
>
> A. Approximately three and a half inches.
>
> * * * * *
>
> Q. Doctor, medically, or practically speaking, not to try and improve on nature, could an individual almost do without the fibula if he had to? (R. 362.)
>
> A. That is possible, although the fibula has a definite function."

The jury was deprived of the knowledge that Mrs. Arnold had previously given a completely different version of the facts and circumstances surrounding the accident. Mrs. Arnold's attorney, in his closing argument, capitalized upon the suppression of her previous statement by directly drawing the jury's attention to the fact that Mrs. Arnold's testimony was unimpeached by any prior statement while certain of the other witnesses had been questioned concerning prior statements. For instance, the defendant's attorney, in his closing argument, stated (R. 658, 659):

> ". . . if you testify to the facts, you don't have to worry about any lawyer cross-examining you. You can't cross-examine the truth. *If you tell the facts you don't have to worry about something you said the day before yesterday because you always remember*

the truth. You don't have to worry about anybody crossing you up, and there is no need for the opposing counsel or opposing lawyer to say, 'Didn't you say this or didn't you say that under oath?' *That is why I am sure of her testimony as I saw her on the witness stand and as I heard the testimony. It isn't impeached in any way.* She just told you the simple truth."

"Was she impeached by that point where she made something to the contrary—some statement to the contrary? Not a bit." (R. 650.)

"If you tell the facts you don't have to worry about (R. 658) something you said the day before yesterday because you will always remember the truth . . . That is why I am sure of her testimony (Mrs. Arnold's) as I saw her on the witness stand and as I heard the testimony. It isn't impeached in any way . . ." (R. 659.)

The seriously prejudicial nature of the defense attorney's remarks, the objection made thereto and the Court's total disregard to the unfairness of the situation are illustrated in the following brief excerpt and are characteristic of the atmosphere the defendant created throughout the entire case.

"I might remind you, Ladies and Gentlemen, that I have never in my experience in trying law suits told a disinterested witness that you don't have to talk to the other side, stay away from them.

"Let me ask you, how would you like to be a litigant in a law suit and have John Doe say to you *whether or not you were on trial for your life or involved in a personal injury* to have the other opposing counsel go to that person and say to them, 'don't talk to them. Don't tell them anything. Don't go to them at all'.

"Mr. Oznon: Your Honor, I object to this, improper argument.

"The Court: The jury will decide this case on the evidence which has been admitted and the law as I instruct the jury, nothing else. Proceed." (R. 642, 643.)

The foregoing represents an example of a most flagrant abuse of closing argument and is typical of the defense counsel's conduct. The Court's statement constituted a ruling denying the plaintiff's motion and totally disregarding a *direct appeal to the sympathy and prejudice of the jury*. What could be more prejudicial than asking a jury to judge the case as if he were the defendant and, to make matters even worse, *a defendant on trial for his life*. Nevertheless, the Court totally disregarded the irreparable injury created by defendant's counsel's statements and merely brushed the matter off with the remark that the case would be decided upon the evidence.

Another example of the plaintiff's objection and the ruling of the trial court occurred when the defendant's counsel directly contradicted the evidence, informing the jury that the plaintiff had said he did not look to the right.

The plaintiff's attorney objected, to which the court stated,

"The jury heard the evidence. Proceed." (R. 657.)

Again, the trial court completely ignored the prejudicial atmosphere created by the defendant and, in effect, overruled the plaintiff's objection to a materially prejudicial matter.

It has been the law in Illinois for more than half a century that it is not necessary to constantly interrupt and repeat the same objection after an adverse ruling has been obtained. Moreover, it has continually been held that where arguments are so prejudicial and reprehensible that the parties cannot receive a fair trial and the judicial process cannot stand without deterioration, the reviewing court will consider assignments of error even though no objection at all was made at the time of the occurrence.